UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

HERMAN SCHUMACHER, MICHAEL P. CALLICRATE, and ROGER D. KOCH,	*	
Plaintiffs,	*	CIV 02-1027
-vs-	*	
TYSON FRESH MEATS, INC., CARGILL MEAT SOLUTIONS CORPORATION d/b/a EXCEL CORPORATION, SWIFT BEEF COMPANY, and NATIONAL BEEF PACKING COMPANY, L.L.C.,	*	
Defendants.	*	

DEFENDANTS' JOINT BRIEF IN RESPONSE TO PLAINTIFFS' *DAUBERT* MOTION TO EXCLUDE THE TESTIMONY OF PROFESSOR STEPHEN R. KOONTZ

EXHIBIT 9

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Citations to the appendix accompanying this brief are indicated by the letter prefix "AP," followed by the number of the appendix page.

Where deposition testimony is cited, page and line numbers are given as well.

Citations to Professor Koontz's expert report (attached to plaintiffs' opening brief as Exhibit A; separately submitted by defendants with figures in their original color version) are indicated by the letter prefix "KR," followed by the number of the cited page.

INTRODUCTION

Professor Schroeder, an agricultural economist, says that his regression models demonstrate that the errors in the U.S. Department of Agriculture ("USDA") boxed beef cutout values are associated with statistically significant effects on fed cattle prices. Professor Hausman, an econometrician, says that Professor Schroeder made elementary methodological mistakes in constructing his regression models. When those mistakes are corrected, the statistically significant effects basically vanish.

Professor Stephen R. Koontz will offer an economic context for the disputed regression models. Professor Koontz is on the faculty of Colorado State University; he is an agricultural economist who has conducted economic research related to the cattle industry for twenty years. (KR 1) During defendants' case-in-chief, Professor Koontz will take Professor Hausman's econometric results as a starting point, and then explain for the jury why it is plausible to think that the USDA boxed beef reporting error did not affect fed cattle prices. Among other things, Professor Koontz will address

- the extent to which the USDA boxed beef cutout values affect the pricing decisions of fed cattle buyers and sellers;
- the reaction (or, more accurately, the ***lack*** of a reaction) of fed cattle prices after the USDA announced its boxed beef reporting error; and
- the fact that if the USDA boxed beef cutout value goes up on one day, there is roughly a 50-50 chance that fed cattle prices will go ***down*** (not up) the next day.

In formulating his opinions in this case, Professor Koontz employed a sound methodology that is well-accepted in the field of economics. Indeed, the methodological approach that he used is described with approval in the Federal Judicial Center's *Reference Manual on Scientific Evidence*.

Plaintiffs object to Professor Koontz's reliance upon Professor Hausman's econometric work. But econometrics (the application of statistical methods to economic data) is different from agricultural economics, and agricultural economists routinely obtain assistance from econometricians. An expert is free to rely on any facts or data "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," Fed.R.Evid. 703, and that is exactly what Professor Koontz did.

Finally, plaintiffs complain that Professor Koontz's expert report is inconsistent with his published writings. In fact, there is no inconsistency. But even if there were, this would go to the weight of Professor Koontz's proposed testimony, not its admissibility.

BACKGROUND

The Relationship Between Boxed Beef Prices and Fed Cattle Prices

Although plaintiffs contend that boxed beef prices cause changes in fed cattle prices, plaintiffs' own expert, Professor Schroeder, has acknowledged that the cause-and-effect relationship is considerably more complicated: in some instances, fed cattle prices cause changes in boxed beef prices (not vice versa). (AP 4, 425:16-20) For example, if more calves than usual are produced in a given year, the additional supply of fed cattle will eventually cause fed cattle prices to decrease, all other things being equal. (AP 2, 417:9-17) The fall in fed cattle prices, in turn, will eventually cause boxed beef prices to decline. (AP 2, 417:18-418:7)

According to Professor Schroeder, economists refer to the "feedback" between boxed beef prices and fed cattle prices as "bidirectional," meaning that the cause and effect relationship is "going both ways, so it wouldn't be one way, it wouldn't be just boxed beef lagging or just fed cattle lagging or leading boxed beef, it was bidirectional." (AP 3, 419:22-420:7)

The Effect on Fed Cattle Prices of a Small Reporting Error in the USDA Boxed Beef Cutout Value

The parties agree that a USDA reporting error could be so small that it simply did not matter in any practical sense. For example, if the USDA made a 1¢ mistake in the Select cutout value on a single day (erroneously reporting the number as $131.33 per cwt rather than $131.34), that mistake would not have an appreciable economic effect. Plaintiffs' expert, Professor Schroeder, admitted at his deposition that it "probably" would not. (AP 5, 453:3-18)

Whether the USDA reporting error was too small to matter is one of the hotly disputed issues in this case.

Professor Koontz's Expert Report

Professor Koontz's expert report addresses a critical question: is it reasonable to conclude that the USDA boxed beef reporting error in April and early May of 2001 had no effect on fed cattle prices? His answer: "yes, that is reasonable."

Professor Koontz began his analysis by evaluating the size of the USDA boxed beef reporting error. He found that the average error in the USDA Choice cutout values was only 2.2 percent, and that the average error in the USDA Select cutout values was smaller still: 0.6 percent. (KR 4)

He then examined the relationship between USDA boxed beef cutout values and fed cattle prices. Did the two move so closely in lockstep that a tiny error in one would necessarily have an impact on the other? Professor Koontz concluded "not necessarily." He found that, as he put it, a "given USDA cutout value is associated with a wide range of fed cattle prices," so that "[k]nowing the USDA cutout value does not permit one to predict the fed cattle price with much precision." (KR 5) For example, he looked at each day over a four year period when the weighted average Choice and Select cutout value was $110 per cwt (plus or minus $1 per cwt). He found that the average fed cattle prices on those days ranged from a low of $60.75 per cwt to a high of $69.70 per cwt (a variance of 14 percent). (KR 5 & Fig. 1)

Professor Koontz also looked to see whether fed cattle prices ever went up after the USDA boxed beef cutout value had gone down (or vice versa). He found that this was commonplace. Over a four-year period (June 2001 to June 2005), Professor Koontz identified 1049 days when the USDA reported a Choice cutout value on one day and an average price for 65-80% Choice steers on the next business day. In 53 percent of those instances, when the USDA cutout value moved in one direction (up or down), the price of 65-80% Choice steers changed the next day in the same direction. But in 47 percent of those instances, the steer price changed in the opposite direction. (KR 7) For example, on May 13, 2003, the (correctly reported) USDA cutout increased $2.03 per cwt, but the steer price ***fell*** the following day, by $1.21 per cwt. (KR 7) On December 15, 2004, the (correctly reported) USDA cutout fell by $2.24 per cwt, but the steer price the next day went ***up***, by $2.58 per cwt. (KR 7)

Professor Koontz also studied the extent to which USDA boxed beef cutout values affect the pricing decisions of fed cattle buyers and sellers. Professor Koontz found that when a packer decides how much to pay for fed cattle, it considers "many, many factors in

addition to its ability to sell the resultant meat at a given price." (KR 11-12) However, "to the extent that the packer factors in meat prices at all, the meat prices received ***by that individual packer*** are likely to be more important than the all-packer cutout values reported by USDA." (KR 11-12, emphasis in original) Professor Koontz analyzed the Choice boxed beef prices that Tyson received, compared to the boxed beef prices reflected in the correct all-packer USDA Choice boxed beef cutout values. At times, there were large differences.[1] (KR 19-20 & Figs. 6)

On the selling side, Professor Koontz found that some cattle owners and feedyard operators follow the USDA boxed beef cutout values, but others do not. (KR 11) For example, Gary Zuehlke, a feedyard operator in Britton, South Dakota, testified that he had "heard the term" cutout, but did not "pay any attention to it." (KR 11) Even for cattle owners and feedyard operators who did pay attention, some focused mainly on the direction of change (i.e., did the cutout values go up or down compared to the day before). (KR 11) Professor Koontz found that the USDA reporting error did not generally cause the USDA to report an erroneous direction of change. Thus, for the 29 reporting days during the error period, the USDA Choice cutout showed a correct direction of change for 22 of the 29 days. The USDA Select cutout showed a correct direction of change for 28 of the 29 days. (KR 11)

Professor Koontz also examined what happened to fed cattle prices after the USDA boxed beef reporting error was disclosed by the government. On Monday, May 14 and Tuesday, May 15, 2001, the USDA published no cutout values. Instead, the daily report for those days was issued with a statement that:

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[1] In fact, some of the differences between the Choice Tyson numbers and the ***correct*** USDA Choice cutout values, outside the error period, were greater than the differences between the Tyson numbers and the ***incorrect*** USDA numbers, within the error period. (KR 19-20 & Fig. 6)

> The cutout values are not being released due to data format and aggregation problems, which resulted in an inadequate volume of data necessary to compile the values.

(KR 12) On Wednesday, May 16, 2001, correct cutout values were reported, along with the previously unreported cutout values from the two previous days. For May 16 itself, the average Choice cutout value was $132.26 per cwt, up $7.60 per cwt from the last regularly reported value (the erroneous value for Friday, May 11). (KR 12)

But this 6 percent jump in the reported USDA boxed beef cutout value had little effect on fed cattle prices. On Wednesday, May 16, the average price of 65-80% Choice steers (as reported by the USDA) ***actually went down*** by 18¢ per cwt (compared to the previously reported selling price, on Friday, May 11), to $74.44 per cwt. The next day, Thursday, May 17, the price of 65-80% Choice steers was reported as ***unchanged***. And the next day, Friday, May 18, the price of 65-80% Choice steers went up by 44¢ per cwt, ***an increase of only 0.6 percent***. (KR 13 & Table 3) Over a three day period, price changes of this magnitude are routine. For example, between June 2001 to June 2005, if one examines periods of three consecutive business days, a fed cattle price change (up or down) of 0.6 percent or more took place 47 percent of the time. (KR 14)

According to Professor Schroeder's regression results, the USDA reporting errors supposedly had a much greater depressive effect on Choice cattle than Select cattle. (KR 14) If so, Choice cattle prices should have gone up more than Select cattle prices after the government disclosed the USDA boxed beef reporting error. But Professor Koontz found the exact opposite: after the error was announced, ***prices for Select cattle increased more than prices for Choice cattle***. (KR 14)

Professor Koontz spent much of his expert report responding to Professor Schroeder's claim that the defendant packers had to have known of the USDA boxed beef reporting error before it was publicly announced by the government. (KR 16-26) He evaluated, for example, whether a packer could have discovered the USDA reporting error by comparing the USDA boxed beef cutout values before and after mandatory price reporting went into effect. He found that such a comparison would not have revealed the error. For one thing, when mandatory price reporting began, on April 3, 2001, the reported USDA cutout values did not change much. The April 2, 2001 USDA report (based upon voluntary reporting) gave a Choice cutout value of $125.57 per cwt. The next day, when the first mandatory price reporting numbers were issued, the ***erroneously reported*** value was $125.25. In Professor Koontz's opinion, the 32¢ per cwt change provided no hint of a reporting error. (KR 22)

In any event, it would have been natural for a packer to have expected the mandatory price reporting cutout numbers to vary somewhat from the previously reported voluntary numbers. There were different reporting procedures in place (voluntary and likely incomplete, versus mandatory and comprehensive). In addition, the USDA's treatment of freight changed with the onset of mandatory price reporting. Under voluntary reporting, cutout values were reported f.o.b. Omaha, whereas under mandatory price reporting, cutout values were reported f.o.b. the packing plant (which may or may not be close to Omaha). (KR 22-23)

As part of his analysis, Professor Koontz plotted the prices that each individual defendant paid for particular lots of fed cattle versus the ***correct*** USDA cutout values from the day the cattle were purchased. Transactions from the error period were represented by red dots, and transactions from outside the error period were represented by blue dots. If, as Professor Schroeder has maintained, defendants systematically and knowingly bought cattle at lower prices

during the error period, then one would expect to see a visible difference between the red dots and the blue dots. But none is apparent. (KR 24-26 & Figs. 8-23)

ARGUMENT

I. PROFESSOR KOONTZ'S EXAMINATION OF THE ECONOMIC CONTEXT FOR THE DISPUTED REGRESSION MODELS REFLECTS A SOUND METHODOLOGY IN THE FIELD OF ECONOMICS.

As a matter of proper methodology, one cannot demonstrate that the USDA boxed beef reporting error ***caused*** lower fed cattle prices through a regression analysis alone. Instead, the data analysis must be coupled with a careful evaluation of the economic context. The *Reference Manual on Scientific Evidence* makes this perfectly clear:

> ***Causality cannot be inferred by data analysis alone; rather, one must infer that a causal relationship exists on the basis of an underlying causal theory*** that explains the relationship between the two variables. ***Even when an appropriate theory has been identified, causality can never be inferred directly. One must also look for empirical evidence that there is a causal relationship.*** Conversely, the fact that two variables are correlated does not guarantee the existence of a relationship; it could be that the model – a characterization of the underlying causal theory – does not reflect the correct interplay among the explanatory variables.

Federal Judicial Center, *Reference Manual on Scientific Evidence* at 184-85 (2000) (emphasis added).[2] A standard econometrics text makes the same point: before an economist can draw a conclusion about causality from a regression model, it is critical

> to check that the results make sense. Are the signs of coefficients as expected? Are important variables statistically significant? Are coefficient magnitudes reasonable? Are the implications of the results consistent with theory? Are there any anomalies? Are any obvious restrictions evident? Apply the "laugh" test – if the findings were explained to a layperson, could that person avoid laughing?

[2] Available at http://air.fjc.gov/public/fjcweb.nsf/pages/16.

P. Kennedy, *A Guide to Econometric Methods* at 393 (5th ed. 2003) (AP 16). Before drawing a conclusion about causality, an economist should perform

> continual searches for additional evidence, both corroborating evidence and, especially, disconfirming evidence. If your theory is correct, are there testable implications? Can you explain a range of interconnected findings? Can you find a bundle of evidence consistent with your hypothesis but inconsistent with alternative hypotheses? Can your theory "encompass" its rivals in the sense that it can explain other models' results?

Id. at 395 (AP 17).

Thus, a complete analysis has two components. The first component is the "data analysis" showing the relationship (if any) between the two variables of interest (in this case, the USDA boxed beef reporting error and fed cattle prices). *Reference Manual on Scientific Evidence* at 184. The second component is to formulate an "underlying causal theory that explains the relationship between the two variables" and to search for "empirical evidence that there is a causal relationship." *Id.* at 184-85.

In this case, Professor Hausman did the data analysis. Professor Koontz's role was to formulate "an underlying causal theory that explains the relationship between the two variables" and to search for "empirical evidence" that there is (or is not) a "causal relationship." *Id.* Professor Koontz's theory was that small errors in the USDA boxed beef cutout values did not affect fed cattle prices. When he looked for empirical evidence that the USDA reporting error did not, in fact, cause lower fed cattle prices, he found compelling support for his theory. For example, the average for 65-80% Choice steers did not change ***at all*** the day after the USDA's boxed beef reporting error was revealed. (KR 13)

Professor Koontz's expert report referred to this division of labor, stating that he took "Professor Hausman's results as a given," and that he was asked "to evaluate whether a

finding of no-effect (as indicated by Professor Schroeder's regression models when corrected by Professor Hausman) makes economic sense to me as an agricultural economist." (KR 1-2 & n.1) Professor Koontz said that he intended to "refer to Professor Hausman's conclusions" during his testimony, but he did not "plan to address the details of the econometric issues and results discussed in Professor Hausman's report." (KR 1-2 & n.1)

To be sure, much of Professor Koontz's data analysis was straightforward. For example, in Figure 1 of his expert report, he presented a simple plot of USDA boxed beef cutout values versus fed cattle prices over a four year period, demonstrating that a given USDA cutout value was associated with a wide range of fed cattle prices. Plaintiffs criticize Professor Koontz for even having made this chart, asserting that it "merely plotted the interaction between two variables along an X-Y axis." *Plaintiffs' Memorandum of Law in Support of Its [Sic, Their] Daubert Motion to Exclude the Testimony of Stephen R. Koontz* at 7 (Sept. 15, 2005) (hereafter "Pl. Mem."). But plaintiffs' criticism is misguided; preparing such charts is a crucial element of a sound analysis:

> Even if a researcher knows the context, he or she needs to become intimately familiar with the specific data with which he or she is working. Economists are particularly prone to the complaint that researchers do not know their data very well, a phenomenon made worse by the computer revolution, allowing researchers to obtain and work with data electronically by pushing buttons. ***Inspecting the data involves summary statistics, graphs, and data cleaning***, to both check and "get a feel for" the data. Summary statistics can be very simple, such as calculating means, standard errors, maximums, minimums, and correlation matrices, or more complicated, such as computing condition indices and influential observation diagnostics. ***The advantage of graphing is that a picture can force us to notice what we never expected to see. Researchers should supplement their summary statistics with simple graphs***: histograms, residual plots, scatterplots of residualized data, and graphs against time.

A Guide to Econometric Methods at 392 (emphasis added) (AP 16).

Professor Koontz's approach was therefore methodologically sound. Although plaintiffs say there was something wrong with Professor Koontz's methodology, they supply no ***evidence*** to support their claim. There is no declaration from Professor Schroeder (or any other economist) indicating that Professor Koontz's analysis would "flunk" the pre-publication peer review process at a reputable agricultural economics journal. Nor is there support from even one econometrics text, the *Reference Manual on Scientific Evidence*, or any other publication. These omissions are fatal: a litigant who challenges an expert's methodology must back up its arguments with "references" to a "body of scientific knowledge." *DePaepe v. General Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998). Judges are normally unable to "make a priori judgments about how scientific inquiry should be conducted," so merely appealing to "a lawyer's sense of how science should be done" is insufficient. *Id.*

This case is hardly comparable to *Blue Dane Simmental Corp. v. American Simmental Ass'n*, 178 F.3d 1035 (8th Cir. 1999), as plaintiffs mistakenly suggest. Pl. Mem. at 8. *Blue Dane* involved nineteen Simmental cattle that were not completely purebred (the animals were 3% Angus). The *Daubert* dispute involved plaintiffs' expert, an agricultural economist named Alan Baquet:

> Dr. Baquet was to testify that the introduction of the nineteen Risinger animals into the fullblood Simmental market in the United States caused the market value of all American Simmentals to drop substantially. To support this testimony, he noted that prior to the introduction of the Risinger animals, both the Canadian and American Simmental markets were dropping. Following the introduction of these animals, the United States market dropped another 53%, while the Canadian market dropped only 26%. Dr. Baquet attributed this 27% difference in market price to the introduction of the Risinger Simmentals.

178 F.3d at 1040. The Eighth Circuit found that this testimony was properly excluded, because it was based upon an unreliable methodology:

> Dr. Baquet attributed the entire difference in market price within the United States and Canada to the Risinger fullbloods, despite the fact that these animals made up a tiny fraction of the market, nineteen out of 138,169 total head. The district court noted that at least one other independent variable contributed to the falling cattle markets, as it was undisputed that both the Canadian and American markets were falling prior to the introduction of the Risinger animals. Furthermore, during his deposition Dr. Baquet admitted that various factors contribute to particular cattle breeds losing market value. He stated that generally an economist would attempt to identify and evaluate all of the independent variables significantly affecting changes in the value of a breed. Dr. Baquet acknowledged that he had neglected to consider any variables other than the introduction of the Risinger fullbloods.

Id.

Although the plaintiffs in *Blue Dane* maintained that Dr. Baquet should have been permitted to testify, they were unable to "cite to any articles or papers that would support Dr. Baquet's approach." *Id.* at 1041. Indeed, the *Reference Manual on Scientific Evidence* discusses the methodological flaw in Dr. Baquet's analysis:

> Spurious correlation arises when two variables are closely related but bear no causal relationship because they are both caused by a third, unexamined variable. For example, there might be a negative correlation between the age of certain skilled employees of a computer company and their salaries. One should not conclude from this correlation that the employer has necessarily discriminated against the employees on the basis of their age. A third, unexamined variable, such as the level of the employees' technological skills, could explain differences in productivity and, consequently, differences in salary. Or, consider a patent infringement case in which increased sales of an allegedly infringing product are associated with a lower price of the patented product. This correlation would be spurious if the two products have their own noncompetitive market niches and the lower price is due to a decline in the production costs of the patented product.

Reference Manual on Scientific Evidence at 184. While the *Reference Manual on Scientific Evidence* warns of the pitfalls of a spurious correlation (Dr. Baquet's methodological problem), it endorses the methodology employed by Professor Koontz. Indeed, a careful examination of the evidence relating to cause and effect (such as Professor Koontz performed) is useful precisely because it helps to avoid the spurious correlation problem.

The other cases relied upon by plaintiffs are even more inapposite. *See, e.g., United States v. White Horse*, 316 F.3d 769, 775 (8th Cir.), *cert. denied*, 540 U.S. 844 (2003) (in prosecution of defendant for sexually molesting his six year old son, the district court properly excluded "a psychologist's testimony that Mr. White Horse did not have a sexual interest in underage boys" because the psychological test employed had never been evaluated with a "statistically significant sample of Native Americans," none of the "slides contained any pictures of Native American adults or children," and the expert's own published paper indicated that "incest offenders often act for reasons other than sexual interest") (cited in Pl. Mem. at 8-9).

II. BECAUSE AGRICULTURAL ECONOMISTS COMMONLY OBTAIN ASSISTANCE FROM ECONOMETRICIANS, PROFESSOR KOONTZ WAS ENTITLED TO RELY UPON PROFESSOR HAUSMAN'S ECONOMETRIC ANALYSIS.

Plaintiffs also argue that Professor Koontz's testimony should be excluded because he "took for granted a conclusion reached by Professor Hausman," and he cannot "testify in support of Professor Hausman's results (since he merely assumed they were accurate)." Pl. Mem. at 3-4. But at trial, Professor Koontz will not be asked to "vouch" for the correctness of Professor Hausman's econometric calculations. Professor Hausman will appear in person, and he alone will explain (and defend) what he did. Professor Koontz was given a different task: to formulate "an underlying causal theory that explains the relationship between the two variables" in the disputed regression models, and then to look for "empirical evidence"

that there was (or was not) a causal relationship between the USDA reporting error and fed cattle prices. *Reference Manual on Scientific Evidence* at 184-85.

Professor Koontz was entitled to take Professor Hausman's econometric analysis as the starting point for his work. Rule 703 contemplates that an expert can rely upon any "facts or data" of a "type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject," Fed.R.Evid. 703, and the "term 'data' is intended to encompass the reliable opinions of other experts." Fed.R.Evid. 702, Advisory Committee Notes, 2000 Amendments. No one can be expected to know everything, so it is "common in technical fields for an expert to base an opinion in part on what a different expert believes." *Dura Automotive Systems of Indiana, Inc. v. CTS Corp.*, 285 F.3d 609, 613 (7th Cir. 2002). For example, the "Committee Notes to the 1972 Proposed Rule 703 give the example of a physician who, though not an expert in radiology, relies for a diagnosis on an x-ray." *Id.* Therefore, a physician giving expert testimony in federal court can properly refer to a radiologist's x-ray as the starting point for his diagnosis.

Just as physicians commonly obtain assistance from radiologists, agricultural economists routinely obtain assistance from econometricians. As Professor Schroeder explained during his deposition, every economist is not an econometrician because "[t]hey haven't necessarily had the training to focus in that expertise area." (AP 9, 809:7-12) Professor Schroeder is an agricultural economist, not an "econometrician scientist," and so he "relied on an econometric expert" to help "with some of the analysis" he did. (AP 6, 572:7-10; AP 8, 808:7-16; AP 10, 823:5-14) In particular, Professor Barry Goodwin of North Carolina State University assisted Professor Schroeder in formulating the new regression models in his "rebuttal" report.

(AP 7, 713:6-20) Professor Schroeder described Professor Goodwin as a "renowned econometrician." (AP 7, 713:21-714:11)

Professor Koontz did something similar. He relied on Professor Hausman, an econometrician, to do the econometric calculations that are needed in this case. Because agricultural economists routinely obtain help from econometricians, Professor Koontz was entitled (under Rule 703) to rely upon Professor Hausman's econometric analysis. Professor Koontz should be permitted to explain to the jury that Professor Hausman's conclusions formed the starting point for his analysis.

III. PROFESSOR KOONTZ'S EVALUATION OF THE ECONOMIC CONTEXT OF THE DISPUTED REGRESSION MODELS IS RELEVANT.

Plaintiffs argue that "Profession [sic, Professor] Koontz did not perform a regression analysis," and his "charts say nothing about causation (or the lack thereof)." Pl. Mem. at 7. Therefore, according to plaintiffs, his proposed testimony does not meet the standard for "relevancy set forth in Fed.R.Evid. 702 because the methodology used by Professor Koontz cannot properly be applied to the facts in issue." Pl. Mem. at 8.

But Professor Koontz's expert report is packed with "specialized knowledge" that "will assist the trier of fact to understand the evidence." Fed.R.Evid. 702. For example, he has analyzed the magnitude of the USDA boxed beef reporting error, concluding that it was small for the Choice cutout (averaging 2.2 percent) and even smaller for the Select cutout (averaging 0.6 percent). (KR 4) He evaluated the closeness of the relationship between the USDA boxed beef cutout value and fed cattle prices. He found that there was a loose association between the two, with lots of statistical noise. (KR 5-7 & Figs. 1-3) Professor Koontz concluded that "[k]nowing

the USDA cutout value does not permit one to predict the fed cattle price with much precision." (KR 5)

Professor Koontz studied the importance of USDA cutout values in the fed cattle pricing decisions of buyers and sellers. (KR 11-12) For the typical packer, "the meat prices received ***by that individual packer*** are likely to be more important than the all-packer cutout values reported by USDA." (KR 12, emphasis in original)

For sellers of fed cattle, some pay attention to the USDA cutout value and some do not. (KR 11) Among sellers who follow the USDA cutout value, some focus mainly on the direction of change (i.e., did the cutout values go up or down compared to the day before). (KR 11) For those sellers, the USDA reporting error could have had little, if any, importance: Professor Koontz confirmed that for the 29 reporting days in the error period, the USDA Choice cutout showed a correct direction of change for 22 of the 29 days, whereas the USDA Select cutout showed a correct direction of change for 28 of the 29 days. (KR 11)

Finally, Professor Koontz analyzed how fed cattle prices reacted when the USDA revealed its boxed beef reporting error. He found (in effect) no reaction. (KR 12-16)

In plaintiffs' view, apparently, the only "relevant" economic opinions are those derived from regression models. But relevance does not turn on the use of regression techniques. To the contrary, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Professor Koontz's proposed testimony is plainly relevant.

IV. PROFESSOR KOONTZ'S EXPERT REPORT IS FULLY CONSISTENT WITH HIS PUBLISHED ARTICLES.

Plaintiffs contend that "Professor Koontz's own previous writings contradict the conclusions he purports to draw in his report." Pl. Mem. at 9. There is no such contradiction. ***Professor Koontz has never published any article that addresses whether the USDA boxed beef reporting error affected fed cattle prices.***

To be sure, he has published articles that discuss whether boxed beef prices and fed cattle prices tend ultimately to move together. Professor Koontz found that, over a period of many months,[3] boxed beef prices and fed cattle prices generally end up moving in the same direction, albeit with lots of statistical noise. A $1 change in boxed beef prices has sometimes (but not always) been associated (over an extended time) with a change in fed cattle prices of between 48¢ and 79¢, depending on the period studied. Pl. Mem. at 9-10.

The range spans 31¢ (indicating the complete absence of any sort of "lockstep" relationship). Moreover, as Professor Schroeder admits, the "feedback" between boxed beef prices and fed cattle is "bidirectional." (AP 3, 419:22-420:7) As a result, the cause-and-effect relationship at any given time could be complex, and different cause-and-effect relationships could come into play at different times. But there is a more fundamental point. ***This case does not turn on whether boxed beef prices and fed cattle prices generally move together over periods of many months.*** Instead, the question is whether small errors in the USDA boxed beef cutout values during a short period (less than six weeks) drove fed cattle prices down, from the first day of the error period to the last (as Professor Schroeder contends). Everyone agrees that if

[3] As plaintiffs note, one study looked at a "thirteen-month period" (Pl. Mem. at 9), and the other looked at a five-month period (Pl. Mem. at 10). The USDA boxed beef reporting error, by contrast, lasted less than six weeks. (KR, Table 1)

a USDA reporting error is small enough, it simply will not matter in any practical sense. For example, as Professor Schroeder admitted at his deposition, if the government made a 1¢ mistake in a single Select cutout value on one day, that mistake would probably not have an appreciable economic effect. (AP 5, 453:3-18)

The issue, then, is whether the USDA reporting error was, in fact, too small to matter.[4] Professor Koontz concludes that it was. He takes Professor Hausman's econometric analysis as his starting point, but then backs up his conclusion with additional facts involving:

- the actual size of the error (KR 4),
- the USDA's generally correct reporting of the direction of change (is the boxed beef number "up" or "down") (KR 11),
- the limited impact of the USDA boxed beef cutout values on the pricing decisions of ***all*** buyers and ***many*** sellers (KR 11-12), and
- the non-response of fed cattle prices to disclosure of the USDA boxed beef reporting error (KR 12-16).

Professor Koontz's conclusion that the USDA boxed beef reporting error was too small to matter is ***supported*** by his published research, finding only a loose association (over a period of many months) between the fed cattle price and the USDA boxed beef cutout values.

[4] Notably, on April 12, 2001, the USDA reporting error for the Select boxed beef cutout was, in fact, 1¢, but Professor Schroeder's "rebuttal" expert report still awards damages for fed cattle purchases made on that day. (AP 11-12 (claimed damages on Tyson purchases); KR, Table 1 (Select cutout error was 1¢ on April 12))

If plaintiffs genuinely believe there is an inconsistency between Professor Koontz's conclusions in this case and his published research, they can pursue that subject on cross-examination. If "well-founded," plaintiffs' claims that Professor Koontz has taken inconsistent positions would "go to the weight to be accorded his opinions by the jury." *Marvin Lumber & Cedar Co. v. PPG Industries, Inc.*, 401 F.3d 901, 916 (8th Cir. 2005). But prior inconsistent statements (even if present) are no basis for excluding expert testimony *in toto*.

V. PLAINTIFFS DO NOT CONTEST THE ADMISSIBILITY OF MUCH OF PROFESSOR KOONTZ'S PROPOSED TESTIMONY.

Much of Professor Koontz's proposed expert testimony is outside the scope of plaintiffs' motion. For example, his expert report responds (at considerable length) to Professor Schroeder's claim that the defendants had to have known of the USDA reporting error before it was announced by the government. (KR 16-26) Plaintiffs do not challenge the admissibility of this testimony.

CONCLUSION

Professor Koontz's painstaking examination of the economic context of the disputed regression models reflects sound economic methodology, and his conclusions are highly relevant to the issues that the jury will be asked to decide. Professor Koontz was entitled to use Professor Hausman's analysis as the starting point for his evaluation, because agricultural economists routinely rely upon econometricians. Plaintiffs' motion to exclude should therefore be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 27, 2005, a true and correct copy of the foregoing *Defendants' Joint Brief in Response to Plaintiffs' Daubert Motion to Exclude the Testimony of Professor Stephen R. Koontz* was sent to the following counsel (through the Clerk's office) via electronic mail:

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